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"Commissioner for Patents and Trademarks  
Arlington, Virginia 22313-1450"

on MARCH 8, 2004

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3 / 8 / 04  
Date of Signature

**PATENT**

**IN THE UNITED STATES PATENT  
AND TRADEMARK OFFICE  
BEFORE THE BOARD OF PATENT  
APPEALS AND INTERFERENCES**

Appellant: Fraser  
Serial No.: 10/009,610  
Filed: April 15, 2002  
For: CONCENTRATED PERFUME COMPOSITIONS AND MANUFACTURE OF  
FABRIC SOFTENING COMPOSITIONS THEREFROM

Group: 1751  
Examiner: J.R. Hardee

Edgewater, New Jersey 07020  
MARCH 8, 2004

**TRANSMITTAL OF BRIEF FOR APPELLANTS**

Commissioner for Patents and Trademarks  
Arlington, Virginia 22313-1450

Sir:

Enclosed herewith are three (3) copies of an Appeal Brief for Appellant.

Please charge the \$330.00 fee to our Deposit Account No. 12-1155.

An oral hearing is requested herein. Please charge the \$280.00 fee to our Deposit Account No. 12-1155. Any deficiency or overpayment should be charged or credited to this Deposit Account. This authorization is submitted in triplicate.

Respectfully submitted,

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Registration No. 36,636  
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C3913 (C )

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### **I. REAL PARTY IN INTEREST**

The Real Party in Interest in this Appeal is Unilever Home & Personal Care USA, Division of Conopco, Inc., a corporation of the State of New York.

### **II. RELATED APPEALS AND INTERFERENCES**

Neither the Appellants, their legal representatives nor the Assignee are aware of any other Appeals or Interferences relating to the present Appeal.

### **III. STATUS OF CLAIMS**

This Appeal is taken from the Final Rejection of claims 1 through 7 and 10 through 14, the pending claims in the application. A copy of the appealed claims is attached to this Brief as an Appendix.

#### **IV. STATUS OF AMENDMENTS AFTER FINAL**

An Amendment after the Final Rejection was filed on November 6, 2003. The Amendment was entered by the Examiner for purposes of this Appeal.

#### **V. SUMMARY OF THE INVENTION**

The invention set forth in the claims on appeal is directed to:

- a *concentrated perfume composition* that also contains a dye;
- a method of manufacturing a fabric softening composition from the concentrated perfume composition; and
- a fabric softening composition so produced.

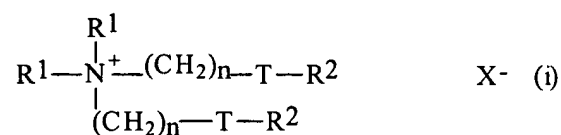
The present invention is directed to a concentrated perfume and dye composition, which is used to give an exact dosage of perfume and dye in a fabric softening composition. Simplified automated manufacture of fabric softening compositions is achieved by addition to a base containing fabric softening agents the concentrated perfume composition of the invention. The concentrated perfume composition is specially formulated to avoid instability problems to which such compositions are generally prone.

Specifically, the inventive *concentrated perfume composition* is a liquid composition comprising:

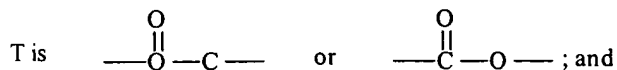
(a) 15-95 wt. % lipophilic perfume, (b) 0.05-5 wt. % water-soluble dye, (c) 4-50 wt. % of a cationic stabilizing agent, (d) a water miscible solvent, and (e) 0.1-20 wt. % water. The stabilizing agent **(1)** must be cationic **and** **(2)** must have an  $L\alpha$  to  $L\beta$  transition temperature of  $45^{\circ}\text{C}$  or below **and** **(3)** it must have the following general formula:



Wherein  $\text{R}^1$  and  $\text{R}^2$  are independently  $\text{C}_1\text{-C}_6$  alkyl, alkenyl, substituted alkyl or alkenyl groups, or hydroxyalkyl groups and  $\text{R}^3$  and  $\text{R}^4$  are independently  $\text{C}_8\text{-C}_{28}$  alkyl, alkenyl, substituted alkyl or alkenyl groups, or hydroxyalkyl groups or, a compound of general formula (i)

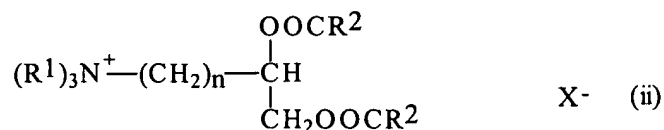


wherein each  $\text{R}^1$  group is independently selected from  $\text{C}_{1-4}$  alkyl, hydroxyalkyl or  $\text{C}_{2-4}$  alkyl groups; and wherein each  $\text{R}^2$  group is independently selected from  $\text{C}_{8-28}$  alkyl or alkenyl groups;  $\text{X}^-$  is chloride or methosulphate;



n is an integer from 0-5;

or, a compound of general formula (ii)



wherein  $R^1$ , n,  $R^2$  and  $X^-$  are as defined above.

The stabilizing agent comprises a cationic stabilizing agent having an L-alpha to L-beta transition temperature of 45 deg. C or below for a 5 wt % dispersion of the stabilizing agent in water. *The specified cationic stabilizing agent must meet the claimed transition temperature requirement to be used according to the invention.* The premix containing cationic stabilizing agent having  $L\alpha$  to  $L\beta$  transition temperature provides a stable pre-mix of perfume and dye. Compounds that are cationic and meet the general structural limitations but which do not meet the transition temperature requirements are not cationic stabilising agents according to the present invention, as they would not promote stability of the concentrated perfume composition. (See Specification, pp.7-8)

The liquid composition described in independent claim 1 is further defined by the dependent claims which claim, among other things, that the composition may be an

isotropic liquid or a water-in-oil emulsion, the amount and/or solubility of the perfume and/or dye, the weight ratio of perfume to dye, the weight ratio of perfume to stabilizing agent, and the amount of water.

Claim 13 is directed to a method for preparing a fabric softening composition comprising the steps;

- (i) preparing a base composition comprising a cationic and/or nonionic fabric softening agent, and
- (ii) adding to (i) a composition as described in claim 1, to produce the fabric softening composition.

Claim 14 is directed to a fabric softening composition obtainable by the method of claim 13.

The claimed compositions, using concentrated amounts of perfume and selected cationic stabilizing agents, uniquely provide an unexpected combination of benefits, including promoting stability of the concentrated perfume composition, ease of dosing of the perfume and dye composition in the manufacture of fabric softening compositions, etc.



## VI. ISSUES AS FRAMED BY THE FINAL REJECTION

The issue raised in this appeal is primarily one of fact and of the type normally encountered in connection with a rejection made under 35 USC §103. In particular, the issue is as follows:

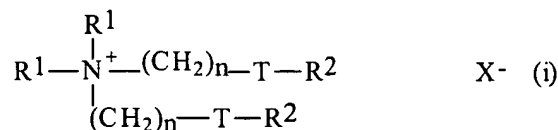
Would one of ordinary skill in the art, upon reading DE 19 751 151 A1 (DE'151) find it obvious to employ the unique combination of

- (a) 15 - 95 wt% lipophilic perfume,
- (b) 0.05 - 5 wt% water-soluble dye,
- (c) about 10 wt% to about 30 wt% of a stabilising agent comprising a cationic stabilising agent that is a compound of general formula (A)



wherein R<sup>1</sup> and R<sup>2</sup> are independently C<sub>1</sub>-C<sub>6</sub> alkyl, alkenyl, substituted alkyl or alkenyl groups, or hydroxyalkyl groups;

and R<sup>3</sup> and R<sup>4</sup> are independently C<sub>8</sub>-C<sub>28</sub> alkyl, alkenyl, substituted alkyl or alkenyl groups, or hydroxyalkyl groups or, a compound of general formula (i)

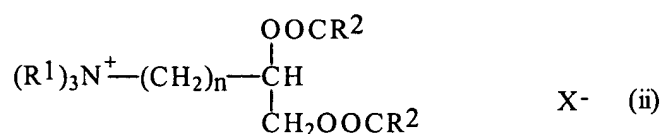


wherein each R<sup>1</sup> group is independently selected from C<sub>1-4</sub> alkyl, hydroxyalkyl or C<sub>2-4</sub> alkyl groups; and wherein each R<sup>2</sup> group is independently selected from C<sub>8-28</sub> alkyl or alkenyl groups; X<sup>-</sup> is chloride or methosulphate;

T is  $\text{---}\overset{\text{O}}{\parallel}\text{C---}$  or  $\text{---}\overset{\text{O}}{\parallel}\text{C---O---}$ ; and

n is an integer from 0-5;

or, a compound of general formula (ii)



wherein R<sup>1</sup>, n, R<sup>2</sup> and X<sup>-</sup> are as defined above; and

(d) water miscible solvent ;

wherein the composition comprises between 0.1 to 20 wt% water, the cationic stabilising agent has an L<sub>α</sub> to L<sub>β</sub> transition temperature of 45°C or below for a 5 wt% dispersion of the stabilising agent in water and the solvent is present in an amount of up to 10 wt%,

as set forth in the claimed invention, to produce a superior *concentrated perfume* composition?

## VII. GROUPING OF CLAIMS

Appellants submit that claims 1 through 7 and 10 through 14 stand and fall together.

**VIII. APPELLANTS' ARGUMENTS**

The Examiner has rejected claims 1-7 and 10-14 under 35 USC §103 as being unpatentable over DE 19 751 151 A1 (hereinafter, DE'151).

In the rejection, the Examiner maintains, in summary, that the DE'151 reference discloses perfume oil micro-emulsions comprising 10-50% by weight of perfume oil, 1-10% by weight of an oil component, 1-30% of an alkylpolyglycoside emulsifier and, optionally, a cationic co-emulsifier. The Examiner further mentions that, "as long as any of the cationic agents of the prior art meet both the structural limitations and the phase transition limitations, a prima facie case of obviousness exists". Moreover, the Examiner again continues by mentioning in the Advisory Action that it is not necessary that all the ester quats in the reference display the recited transition. In this regard, the Examiner maintains that the 35 USC §103 rejection is proper and should be made final.

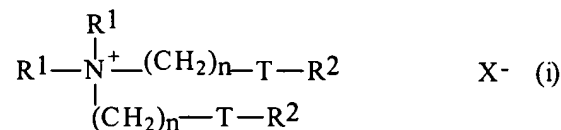
Notwithstanding the Examiner's apparent position to the contrary, it is, again, the Applicants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

The present invention, again, as set forth in independent claim 1, is directed to a liquid composition comprising:

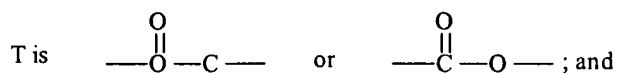
(a) 15-95 wt. % lipophilic perfume, (b) 0.05-5 wt. % water-soluble dye, (c) 4-50 wt. % of a cationic stabilizing agent, (d) a water miscible solvent, and (e) 0.1-20 wt. % water. The stabilizing agent **(1)** must be cationic **and** **(2)** must have an  $L\alpha$  to  $L\beta$  transition temperature of  $45^{\circ}\text{C}$  or below **and** **(3)** it must have the following general formula:



Wherein  $\text{R}^1$  and  $\text{R}^2$  are independently  $\text{C}_1\text{-C}_6$  alkyl, alkenyl, substituted alkyl or alkenyl groups, or hydroxyalkyl groups and  $\text{R}^3$  and  $\text{R}^4$  are independently  $\text{C}_8\text{-C}_{28}$  alkyl, alkenyl, substituted alkyl or alkenyl groups, or hydroxyalkyl groups or, a compound of general formula (i)

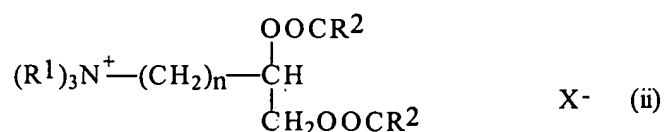


wherein each  $\text{R}^1$  group is independently selected from  $\text{C}_{1-4}$  alkyl, hydroxyalkyl or  $\text{C}_{2-4}$  alkyl groups; and wherein each  $\text{R}^2$  group is independently selected from  $\text{C}_{8-28}$  alkyl or alkenyl groups;  $\text{X}^-$  is chloride or methosulphate;



n is an integer from 0-5;

or, a compound of general formula (ii)



wherein  $\text{R}^1$ ,  $n$ ,  $\text{R}^2$  and  $\text{X}^-$  are as defined above.

The stabilizing agent comprises a cationic stabilizing agent having an L-alpha to L-beta transition temperature of 45 deg. C or below for a 5 wt % dispersion of the stabilizing agent in water. *The specified cationic stabilizing agent must meet the claimed transition temperature requirement to be used according to the invention.* The premix containing cationic stabilizing agent having  $\text{L}\alpha$  to  $\text{L}\beta$  transition temperature provides a stable pre-mix of perfume and dye. Compounds that are cationic and meet the general structural limitations but which do not meet the transition temperature requirements are not cationic stabilising agents according to the present invention, as they would not promote stability of the concentrated perfume composition.

The liquid composition described in independent claim 1 is further defined by the dependent claims which claim, among other things, that the composition may be an isotropic liquid or a water-in-oil emulsion, the amount and/or solubility of the perfume and/or dye, the weight ratio of perfume to dye, the weight ratio of perfume to stabilizing agent, and the amount of water.

Claim 13 is directed to a method for preparing a fabric softening composition comprising the steps;

- (i) preparing a base composition comprising a cationic and/or nonionic fabric softening agent, and
- (ii) adding to (i) a composition as described in claim 1, to produce the fabric softening composition.

Claim 14 is directed to a fabric softening composition obtainable by the method of claim 13.

In contrast and as already made of record, the DE'151 reference is directed to fabric softeners of which a perfume micro-emulsion is a component. There is no teaching whatsoever in the DE'151 reference regarding the critical phase transition temperature limitation. Moreover, there is no teaching whatsoever in the DE'151 reference to employ quaternary ammonium compounds within the perfume micro-emulsion component, or to employ the cationic quaternary ammonium compounds in the concentrated amount that is required to stabilize the concentrated perfume composition, as forth in the independent claim. Although the cited reference permits the *optional* use of up to 10 % cationic emulsifier, such emulsifier is not required for achieving a *stable perfume composition* and the amount of cationic emulsifier permitted is less than that required for the present invention. Further, there is no teaching in the DE'151 reference that suggests a composition as claimed herein whereby the

quaternary ammonium and amine salts, having an L-alpha to L-beta transition temperature of 45 deg. C or below, within the composition can advantageously serve as stabilizing agents for a micro-emulsion.

The Examiner correctly admits that the DE'151 reference does not disclose a composition that reads on Applicant's claims with sufficient specificity to constitute anticipation. Moreover, Applicants respectfully submit that the rejection, as maintained in the Final Office Action, does not address the fact that DE '151 fails to disclose or suggest a critical element of the present invention, which contributes to the stability of the present concentrated perfume and dye compositions. **Specifically, the reference fails to disclose or suggest that the stabilizing agent have an  $L\alpha$  to  $L\beta$  transition temperature of 45°C or below.** As stated in Applicant's specification, not all cationic stabilizing agents that meet the structural limitations meet the  $L\alpha$  to  $L\beta$  transition temperature limitation (pp. 7-8). As such, a *prima facie* case of obviousness has not been set forth.

To demonstrate the importance of the L-alpha to L-beta transition temperature claim limitation, attention is drawn to page 7, line 25 through page 8, line 2 of the present specification. The reference relied upon, does not even in the slightest way, suggest the phase transition temperature of any of the ester quats. The present invention is distinguishable over DE'151. Appellant respectfully submits that:

- (1) Not all cationic stabilizing agents of structural formulas within the scope of the claims have an L-alpha to L-beta transition temperature of 45 deg. C or less; and
- (2) Using cationic stabilizing agents having an L-alpha to L-beta transition temperature of 45 deg. C or less provides more stable products than otherwise.

In order to make out a *prima facie* case of obviousness, an Office Action must show that a cited reference discloses or suggests all the limitations of the invention as claimed, i.e., the invention must be viewed as a whole. Appellant respectfully submits that a *prima facie* case of obviousness has not been made out, for the following reasons. The rejection does not address the fact that DE '151 fails to disclose or suggest a critical element of the present invention, which contributes to the stability of the present concentrated perfume and dye compositions. **Specifically, the reference fails to disclose or suggest that the stabilizing agent have an  $L\alpha$  to  $L\beta$  transition temperature of 45°C or below.** As stated in Applicant's specification, not all cationic stabilizing agents that meet the structural limitations meet the  $L\alpha$  to  $L\beta$  transition temperature limitation (pp. 7-8). As such, a *prima facie* case of obviousness has not been set forth.

In view of the above, it is again clear that the Examiner has not established a *prima facie* case of obviousness as required under 35 USC §103. When establishing a *prima facie* case of obviousness, it is fundamentally improper to gloss over important and



critical claim limitations. The "invention as a whole" must be considered, including all limitations of the claimed invention. *In re Boe*, 184 U.S.P.Q. 38, 40 (C.C.P.A. 1974) ("...", all limitations must be considered and that it is error to ignore specific limitations distinguishing over the references"). While Appellant has not contested the Examiner's point regarding:

as long as any of the cationic agents of the prior art meet both the structural limitations and the phase transition limitations, a *prima facie* case of obviousness exists,

Appellant respectfully submits that, regardless of whether the Examiner's statement is correct, neither the Examiner nor the cited reference discloses or suggests that the prior art meets the phase transition limitations (regardless of whether or not it meets the structural limitations). Appellant respectfully submits that the burden of showing where in the cited reference the critical transition temperature limitation is disclosed or suggested has not been met.

Furthermore, the Examiner has not provided a reason to provide only the cationic stabilizing agents that have the claimed  $L\alpha$  to  $L\beta$  transition temperature. The mere fact that the reference could be modified as proposed in the Office Action is not sufficient to establish a *prima facie* case of obviousness. See In re Fritch, 23 USPQ2d 1780, 1783 (Fed. Cir. 1992). The Office Action must explain why the reference would have suggested to one of ordinary skill in the art the desirability of the modification. Id. at 1783-84. The Examiner has not provided such an explanation.

The subject matter of claims 1-7 and 10-14 cannot be deduced from the cited document and is, therefore, not obvious over DE'151.

In view of the above, Appellant submits that a proper rejection under 35 U.S.C. 103 has not been made. Accordingly, reversal of the Final Rejection by the Honorable Board is appropriate and is courteously solicited.

#### VIII. CONCLUSION

Appellants respectfully request that the Board of Patent Appeals and Interferences reverse the Examiner's final rejection of claims 1-7 and 10-14 under 35 U.S.C. 103.

An oral hearing is hereby respectfully requested.

Respectfully submitted,



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Agent for Applicant(s)

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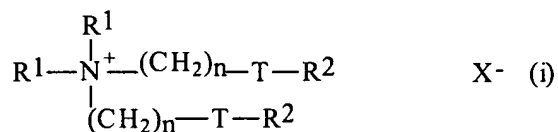
**X. APPENDIX**

1. (previously amended) A liquid composition comprising:
- (a) 15 - 95 wt% lipophilic perfume,
  - (b) 0.05 - 5 wt% water-soluble dye,
  - (c) about 10 wt% to about 30 wt% of a stabilising agent comprising a cationic stabilising agent that is a compound of general formula (A)

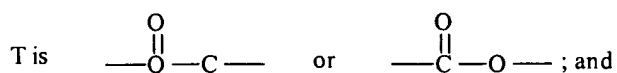


wherein  $\text{R}^1$  and  $\text{R}^2$  are independently  $\text{C}_1\text{-C}_6$  alkyl, alkenyl, substituted alkyl or alkenyl groups, or hydroxyalkyl groups;

and  $\text{R}^3$  and  $\text{R}^4$  are independently  $\text{C}_8\text{-C}_{28}$  alkyl, alkenyl, substituted alkyl or alkenyl groups, or hydroxyalkyl groups or, a compound of general formula (i)

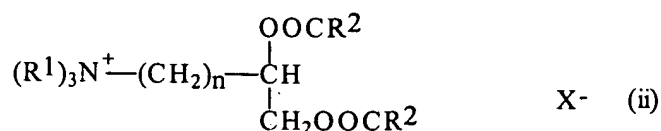


wherein each  $\text{R}^1$  group is independently selected from  $\text{C}_{1-4}$  alkyl, hydroxyalkyl or  $\text{C}_{2-4}$  alkyl groups; and wherein each  $\text{R}^2$  group is independently selected from  $\text{C}_{8-28}$  alkyl or alkenyl groups;  $\text{X}^-$  is chloride or methosulphate;



n is an integer from 0-5;

or, a compound of general formula (ii)



wherein  $\text{R}^1$ ,  $n$ ,  $\text{R}^2$  and  $\text{X}^-$  are as defined above; and

(e) water miscible solvent ;

wherein the composition comprises between 0.1 to 20 wt% water, the cationic stabilising agent has an  $\text{L}\alpha$  to  $\text{L}\beta$  transition temperature of  $45^\circ\text{C}$  or below for a 5 wt% dispersion of the stabilising agent in water and the solvent is present in an amount of up to 10 wt%.

2. (original) A composition according to claim 1 wherein the composition is an isotropic liquid.
3. (original) A composition according to claim 2 wherein the isotropic liquid is a water-in-oil microemulsion.
4. (previously amended) A composition according to claim 1 comprising 40-85 wt% perfume.
5. (previously amended) A composition according to claim 1 wherein the perfume has a solubility in water of equal to, or less than 0.5g in 100 ml of water at  $20^\circ\text{C}$ .
6. (previously amended) A composition according to claim 1 comprising 0.2 wt% to 1 wt% dye.

7. (previously amended) A composition according to claim 1 wherein the dye has a solubility in water of equal to or greater than 5g of 100 ml of water at 20°C.
8. (cancelled)
9. (cancelled)
10. (previously amended) A composition according to claim 1 wherein the weight ratio of perfume to dye is within the range 200:1 to 5:1, preferably 100:1 to 15:1.
11. (previously amended) A composition according to claim 1 wherein the weight ratio of perfume to stabilising agent is 10:1 to 1:1, preferably 5:1 to 1:1.
12. (previously amended) A composition according to claim 1 comprising 0.1-10 wt% water.
13. (previously amended) A method of preparing a fabric softening composition comprising the steps;
  - (i) preparing a base composition comprising a cationic and/or nonionic fabric softening agent, and
  - (ii) adding to (i) a composition according to claim 1, to produce the fabric softening composition.
14. (original) A fabric softening composition obtainable by the method of claim 13.